

1 **GUAM DEPARTMENT OF EDUCATION**

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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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FILE NO OPA-PA: 16-010

8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

9 IN THE APPEAL OF

OPA-PA-16-010

10 XEROX CORPORATION,

**GDOE'S HEARING BRIEF**

11 Appellant.

12 Comes now the Guam Department of Education (GDOE) by and through its counsel and  
13 files its Hearing Brief in response to appeal by Xerox Corporation (Xerox).

14 **I.**

15 **GDOE PROPERLY CANCELLED IFB 004-2016,**  
16 **CONSISTENT WITH GUAM PROCUREMENT LAW,**  
17 **BECAUSE GDOE IS REQUIRED TO OBTAIN THE**  
18 **ATTORNEY GENERAL'S SIGNATURE IN ORDER TO**  
19 **EXECUTE THIS CONTRACT, WHICH SIGNATURE**  
20 **THE ATTORNEY GENERAL'S OFFICE REFUSED TO**  
21 **PROVIDE; CONTRARY TO APPELLANT'S CLAIMS.**

22 In order for GDOE to fully execute this contract between the Department and Xerox,  
23 GDOE must obtain the Attorney General's Signature. Consequently, GDOE submitted the  
24 Agreement to the Attorney General (AG) and subsequently to the Governor for the purpose of  
25 obtaining both of their signatures. However, Assistant Attorney General (AAG) Mooney  
26 reviewed the Agreement and rejected it, because AAG Mooney stated that the Agreement utilized  
27 GSA pricing guidelines that GDOE was unable to legally use since there is no enabling statute.  
28 Specifically, AAG Mooney informed GDOE that: "Absent express legal authorization to procure  
in the method DOE proposes to do so from Xerox Corporation, in IFB 004-2016, DOE is

1 prohibited under Guam Procurement Law and Regulations from doing so at this time.” *See*  
2 GDOE 949-50. Therefore, AAG Mooney’s rejection of the Agreement for the reasons she stated  
3 provided a compelling and cogent reason for GDOE to reject all bids and cancel the IFB as a  
4 whole.

5 Despite the legally proper actions of GDOE, Appellant claims that the AG waived its  
6 objection because of the timing of AAG Mooney’s rejection letter to GDOE. Appellant’s claim  
7 is not supported by Guam Procurement Law. As already stated in GDOE’s rebuttal, the issuance  
8 of a solicitation does not compel an award of a contract. *See* 2 GAR §3115(b). Consequently,  
9 Appellant’s erroneous claims ---- specifically, that the AG’s Office waived the objections it raised  
10 subsequent to the awarding, and that the AG cannot interject with an objection after an award has  
11 been issued --- are completely unfounded and meritless. *See* Appellant’s Comments p. 1-2.

12 Section 2.4.3 of IFB 004-2016, titled “Notice of Award,” states that any award pursuant to  
13 this IFB will not be complete until an agreement is fully executed by the selected bidder, GDOE,  
14 and other required parties. *See* GDOE 297. Consequently, by submitting a bid that was  
15 responsive to the terms of IFB 004-2016 (including Section 2.4.3), Appellant clearly knew that  
16 award of the IFB would not be complete until the agreement was fully executed by other required  
17 parties. More important, Appellant also clearly knew that award of the IFB would not be  
18 complete until the AG, as a required party, executed this Agreement. Therefore, Appellant’s  
19 claim that the AG’s objections to signing the Agreement were untimely is wholly disingenuous,  
20 because Appellant was aware of all of the terms stated in and required by the IFB.  
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23 In summary, because the AG is a required party who must execute this Agreement before  
24 the Agreement is complete, and because AAG Mooney rejected the IFB for her stated reason that  
25 there is no explicit law enabling GDOE to use GSA federal pricing, GDOE acted properly and  
26 consistent with Guam Procurement Law when it rejected all bids and canceled IFB 004-2016.  
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**II.**

**GDOE'S CANCELLATION OF IFB 004-2016 IS COMPLETELY PERMISSIBLE UNDER GUAM PROCUREMENT LAW, GUAM PROCUREMENT REGULATIONS, AND THE EXPRESS TERMS OF THE IFB ITSELF, WHICH LAW, REGULATION, AND IFB TERMS APPELLANT IS FULLY AWARE OF; WHICH PERMISSIBILITY IS CLEAR DESPITE APPELLANT'S ATTEMPT TO DISTINGUISH ANALOGOUS FEDERAL CASE LAW.**

Title 5 GCA § 5451, titled "Remedies Prior to an Award," states that, if prior to award, it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be cancelled or revised to comply with law. *See also* 2 GAR § 9105.

On November 18, 2015, GDOE published IFB 004-2016. Section 3.9 of IFB 004-2016, titled "Right of GDOE to cancel or reject invitation for bids of IFB 004-2016," states that GDOE reserves the right to cancel this IFB at any time when it is in the best interest of the Department, in accordance with 5 GCA § 5225 and 2 GAR Div. 4 § 3115(c). *See* GDOE 303. Cited in Section 3.9, Title 5 GCA § 5225, titled "Cancellation of invitations for bids or requests for proposals," states that an invitation for bids, a request for proposals, or other solicitation may be cancelled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the Territory in accordance with regulations promulgated by the Policy Office. Title 2 GAR (Guam Administrative Rules and Regulations) Div. 4 § 3115(b) states that although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the territory's best interest.

1 In addition, as previously mentioned in GDOE's Agency Statement, Title 2 GAR §  
2 3115(d)(2)(A)(iii) states that all bids or proposals may be rejected in whole or in part when the  
3 Chief Procurement Officer or the head of the Purchasing Agency determines in writing that such  
4 action is in the territory's best interest for reasons the solicitation did not provide for  
5 consideration of all factors or significance to the territory.

6 Therefore, pursuant to GDOE's terms and conditions which are expressly stated in the  
7 IFB (and which terms and conditions Appellant is fully aware of), and which specifically  
8 reference applicable Guam Procurement Law and Guam procurement regulations, it is absolutely  
9 clear that GDOE acted properly in canceling the IFB because of AAG Mooney's objection.  
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11 Again, despite the propriety and lawfulness of GDOE's actions, Appellant claims that  
12 GDOE does not have a cogent and compelling reason to cancel IFB 004-2016, and that GDOE  
13 must consider more than the simple fact that a solicitation contains errors before deciding to  
14 cancel a solicitation. However, Title 5 GCA §5451 and 2 GAR §9105(a) state that if prior to  
15 award, a contract is determined to be illegal, the solicitation shall be canceled. Here, though IFB  
16 004-2016 included language that permitted federal GSA (General Services Agency) pricing  
17 guidelines, AAG Mooney informed GDOE that GDOE is prohibited under Guam Procurement  
18 Law and regulations from utilizing those federal GSA pricing guidelines. Consequently, based on  
19 AAG Mooney's determination, if GDOE did not cancel the award in IFB 004-2016, then GDOE  
20 would be violating Guam law. Therefore, consistent with Title 5 GCA §5451 and 2 GAR  
21 §9105(a), GDOE properly canceled the IFB because AAG Mooney determined the IFB to be  
22 illegal, and which cancellation of the illegal IFB was clearly in the best interest of the Territory.  
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25 In addition, Appellant appears to be distinguishing the applicable federal case law  
26 referenced by GDOE, claiming that GDOE is assuming that it is entitled to certain deference and  
27 discretion. Appellant's assumptions about GDOE are wrong. To be clear, GDOE provided  
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1 federal case law that is analogous to the facts and situations here, so that the OPA (Office of  
2 Public Accountability) could see examples of how similar situations have been properly resolved.

3 For example, in *Caddell Constr. vs. United States*, the U.S. Navy issued an IFB for  
4 construction of a building. See 7 Cl.Ct. 236 (1985). Two months after issuing the IFB, the  
5 Navy canceled it because their bid contained errors, omissions, and ambiguities in the  
6 specifications. *Id.* at 5. Similar to Guam law, the federal court required the U.S. Navy to provide  
7 a compelling reason for rejecting all bids and cancel the invitation. Also citing 48 CFR §14.  
8 404-1(c)(6). The federal court held that unreasonably high bids, defective specifications,  
9 mistaken contractual provisions, and erroneous specifications may be compelling reasons within  
10 the discretion of the contracting officer for rejection of all bids. *Id.* The federal court also agreed  
11 with the Navy that the defective specifications included in the IFB were a compelling reason for  
12 the Navy to cancel the IFB, holding that the authority vested in the contracting officer to decide  
13 whether to cancel an IFB and re-advertise is extremely broad. *Id.* at 7.

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15 In another example, in *First Enterprise v. United States*, plaintiff First Enterprise  
16 challenged the US Department of Veteran Affairs' decision to cancel an IFB and convert it into a  
17 Request for Proposal (RFP). See 61 Fed.Cl. 109 (2004). The federal court stated that  
18 cancellation of a solicitation is disfavored after bids have been opened; however, the federal court  
19 also stated that cancellation of an IFB is permitted in compelling circumstances. *Id.* at 9. The  
20 law in this case (like the case above) is comparable to Guam law; specifically, the federal court  
21 here utilized the standards in 48 CFR §14.404-1(a)(1)(2004), which requires a compelling reason  
22 to reject all bids and cancel the IFB. The court found that unreasonable price was a compelling  
23 reason to reject all bids and that there was no showing of fraud or bad faith by the cancellation.  
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25  
26 *Id.*

1 The examples provided by the *Cadell* case and the *First Enterprise* case show that federal  
2 courts have determined defective and erroneous specifications as well as mistaken contractual  
3 provisions to be compelling reasons to reject all bids and cancel an IFB. Analogous and similar  
4 to those federal cases, GDOE asserts that an IFB that would result in an illegal agreement would  
5 be an equally compelling, if not even more compelling reason to cancel IFB 004-2016. Based on  
6 AAG Mooney's determination that it is against Guam Procurement Law to utilize federal GSA  
7 pricing guidelines without express legal authorization, GDOE clearly had a cogent and  
8 compelling reason to cancel IFB 004-2016.  
9

10 **CONCLUSION**

11 For the reasons stated above, GDOE respectfully maintains that its cancellation of IFB  
12 004-2016 --- based on AAG Mooney's determination that Guam law did not authorize GDOE to  
13 use federal GSA pricing guidelines thereby making the IFB illegal --- was in full compliance with  
14 Guam Procurement Law, Guam procurement regulations, and the express terms of the IFB, which  
15 express terms (citing such law and regulations) were fully known and understood by Appellant.  
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17 Dated this 7<sup>th</sup> day of October, 2016.

18 Respectfully submitted,

19 **GUAM DEPARTMENT OF EDUCATION**

20 By:   
21 **JAMES L.G. STAKE**  
22 *Legal Counsel*  
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